



Fed. R. Civ. P. 37(a)(5)(A) provides that when discovery is produced after a motion to compel is filed: “. . . the court **must not** order th[e] payment [of attorney fees] if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party’s nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.”

(Emphasis added.) Despite this clear mandate, the Magistrate Judge never determined whether the State fulfilled this exception to the Rule and never cited Rule 37(a)(5)(A)(i), (ii) or (iii) in the May 20 Order. Indeed, the Magistrate Judge never even mentioned, let alone ruled on, the State’s arguments that its production of data after the Motion to Compel was “substantially justified” or that the overall circumstances render an award of fees unjust. Instead, the Magistrate Judge simply stated that “Defendants did make proper demand [for fees] and that meet and confer discussions were conducted.” Dkt. #1710 at 6. The Magistrate Judge provided no factual support for these findings; and whatever limited findings the Magistrate Judge did make provide a wholly insufficient basis for an award of fees in light of Rule 37(a)(5)(A)(i), (ii) and (iii).

The Magistrate Judge also made no mention of LCvR 37.1 which provides that: “this Court **shall refuse to hear** any [discovery dispute] motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord.” (Emphasis added.) As shown below, the uncontested facts demonstrate a total absence of any sincere attempt by Defendants to resolve the subject discovery disputes before filing the Motion to Compel. In fact, the undisputed facts are

that the Motion to Compel was filed without warning, over two months after the State's last written communication ended with "I trust this letter is fully responsive to your requests." The Federal Rules forbid the Court from imposing sanctions under such circumstances, and the Magistrate Judge's award of fees must be set aside as being clearly erroneous and contrary to law.

### **BACKGROUND**

On January 5, 2007, the Magistrate Judge entered an Order ("January 5, 2007 Order") requiring the State to produce "requested data, testing, sampling, and results" to Defendants. Dkt. #1016 at 8. More specifically, the January 5, 2007 Order required the State to "produce all documents identified by Plaintiffs [sic] and the Court by February 1, 2007." *Id.* at 11. The January 5, 2007 Order contained no requirements with respect to supplemental production or the timeliness of supplemental production.

Beginning on February 1, 2007, and continuing to the present, the State has produced the scientific testing results developed through Camp Dresser and McKee's ("CDM") environmental sampling program as that data has completed CDM's internal Quality Assurance/Quality Control ("QA/QC") process which it provides as part of its normal expert data collection process for its clients. It is uncontested that the State has produced tens of thousands of pages of lab reports, chain of custody reports, field sheets, field books and quality assurance reports similar to those at issue in this Motion. It has produced the lab analysis for thousands of separate sampling events and the protocols under which the samples were collected. Defendants have been provided sampling results from nine different laboratories, including the QA/QC documents and the chain of custody forms. They have been provided the results of water quality sampling, bacteria

data, chemical analysis, including testing for hormones, data on fish counts, and data concerning benthic and macroinvertebrate sampling. The production has also included thousands of pictures and the reports from hundreds of hours of observations by investigators.

Nonetheless, Defendants have raised alleged concerns about the production over a period of months. In every instance that a concern has been raised, the State has attempted in good faith to address the concern. Communications between the parties on the production issues have been almost exclusively in writing, and the parties never reached an impasse on any production matter at issue prior to the filing of the subject Motion to Compel. The last two letters between the parties before the Motion to Compel are demonstrative of this.

In a November 30, 2007 letter from Robert George (counsel for Tyson Defendants) to Louis Bullock (counsel for the State), Defendants raised several specific concerns about the State's continuing production and asked the State to respond promptly. Ltr. from R. George to L. Bullock, 11/30/07, Ex. 1. Importantly, Mr. George ended the November 30, 2007 letter by acknowledging Defendants' duty to meet and confer before filing any motion to compel:

“If Defendants' above-mentioned concerns are not fully and adequately addressed . . . the parties will need to schedule a meet and confer and, if necessary, bring the appropriate motion.”

*Id.* at 5 (emphasis added).

The State responded to the November 30, 2007 letter on December 19, 2007. Ltr. from L. Bullock to R. George, 12/19/07, Ex. 2. Notably, nowhere in the December 19, 2007 letter did the State refuse to produce any of the data requested by Defendants in the

November 30, 2007 letter. Ltr. from L. Bullock to R. George, 12/19/07, Ex. 2. In fact, the December 19, 2007 letter was part of the State's continuing good faith attempt to answer Defendants' alleged concerns and to resolve any lingering discovery disputes:

- ▶ "I believe you have all of the QA/QC documents, but if you could specify which you believe you are missing, I will attempt to run them to ground."
- ▶ "NO DATA is being withheld nor will any be withheld as the result of [the QA/QC] process, and no results have been or will be changed as a result of this internal QA/QC procedure."
- ▶ "The census data is publicly available data. . . . That issue aside, you will receive this data as part of the information relied upon or considered by Dr. Fisher."
- ▶ ". . . I am open to discussing a possible exchange of [GPS correlation] charts . . . Let me know if such a discussion might bear fruit."
- ▶ ". . . [W]e have produced the data as it has become available resulting in the Defendants receiving it in pieces rather than in one completed package. This has resulted in your receiving it in much the same manner as the Plaintiff has received it."

*Id.* at 1–3. Mr. Bullock ended the December 19, 2007 letter by stating, "I trust this letter is fully responsive to your requests." *Id.* at 3. But Defendants never replied to the December 19, 2007 letter and never sought to meet and confer with respect to any issue addressed in the letter. The State was thus left to understand that it had in fact fully responded to Defendants' concerns.

Without any warning, and during the hearing on the State's Motion for Preliminary Injunction, Defendants filed their Motion to Compel on February 29, 2008 – over two months after Mr. Bullock's December 19, 2007 letter. Dkt. #1605. As part of the Motion to Compel, Defendants sought an order broadly compelling the State to "disclose any additional data" required by the January 5, 2007 Order. *Id.* at 9. Notably, Defendants did not request an award of attorney fees and costs as part of the Motion to

Compel. In addition, the Motion to Compel was limited to alleged noncompliance with the January 5, 2007 Order; Defendants did not allege that the State had violated any statutory duty to timely supplement under Rule 26(e) of the Federal Rules of Civil Procedure.

On March 25, 2008, the State once again supplemented its production to Defendants. *See* Aff. of Todd Burgesser, Dkt. #1691-2. Most of this supplemental production consisted of documents generated in early 2008 or documents in electronic format that had been previously produced in hard copy format. *Id.* An additional supplemental production was made on April 3, 2008. In its response brief, the State argued that the Motion to Compel was moot as the production had been fully and completely updated and supplemented.

In their reply brief, Defendants raised, for the first time, a request for attorney fees as a sanction for the State's allegedly deficient production of data and raised several new factually specific allegations concerning the State's productions of March 25 and April 3, 2008.<sup>1</sup> Defendants' Reply, Dkt. #1672, at 2–9. Defendants pointed to these new allegations in support of the argument that "Plaintiffs' [sic] own production proves that they have substantially violated both Rule 37 and this Court's January 5, 2007 Order." *Id.* at 7. Defendants specifically argued that an award of fees was warranted because documents were produced after the Motion to Compel was filed.

Due to the new allegations concerning March 25 and April 3 productions and new request for fees, the State felt compelled to respond and sought leave to file a sur-reply brief. Leave was granted, and the State filed its sur-reply on April 28, 2008. Dkt. #1691.

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<sup>1</sup> In their reply brief, Defendants mistakenly refer to the production of April 4, 2008, but the materials were actually produced on April 3, 2008.

In the sur-reply, the State argued that the new request for attorney fees was barred by Rule 37(a)(5)(A)(i), (ii) and (iii) (lack of good faith attempt to obtain disclosure without court action; production after Motion to Compel was “substantially justified”; other circumstances render an award of fees unjust). The State also argued that the Motion to Compel should be denied in its entirety due to Defendants’ failure to certify that they had met and conferred with the State and made a good faith and sincere effort to resolve the subject discovery concerns without court action. Lastly, the State argued that the Court should not consider the new request for fees and new allegations as they were raised for the first time in Defendants’ reply brief.

A hearing on the Motion to Compel was held before the Magistrate Judge on May 6, 2008.

The Magistrate Judge issued the Order granting the Motion to Compel and awarding attorney fees and costs on May 20, 2008. The May 20 Order is the subject of these present Objections.

### **STANDARD OF REVIEW**

Rule 72(a) of the Federal Rules of Civil Procedure provides that “[a] magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter.” Rule 72(a) gives the parties ten days from service of the magistrate judge’s order in which to “serve and file objections to the order.” *Id.*<sup>2</sup> If an objection is filed,

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<sup>2</sup> Under Rule 6(a) of the Federal Rules of Civil Procedure, “[w]hen the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.” “Legal Holiday” is

“[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge’s order found to be clearly erroneous or contrary to law.” *Id.*

### **ARGUMENT AND AUTHORITY**

#### **I. THE MAGISTRATE JUDGE’S GRANT OF THE MOTION TO COMPEL AND AWARD OF ATTORNEY FEES AND COSTS IS CONTRARY TO MEET AND CONFER PROVISIONS OF RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL CIVIL RULE 37.1**

Without any discussion, elaboration or foundation, the Magistrate Judge found, as part of the May 20 Order, that “meet and confer discussions were conducted.” Dkt. #1710 at 6. However, in so finding, the Magistrate Judge did not mention the mandates of Fed. R. Civ. P. 37(a)(1), Fed. R. Civ. P. 37(a)(5)(A)(i) or LCvR 37.1. Thus, the Magistrate Judge obviously did not opine as to whether the unspecified “meet and confer discussions” were sufficient to constitute Defendants’ “attempt[] in good faith to obtain the disclosure or discovery without court action” as required by Fed. R. Civ. P. 37(a)(5)(A)(i). Similarly, the Magistrate Judge failed to point to any evidence that Defendants “advise[d] the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach accord” as required by LCvR 37.1.<sup>3</sup>

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defined to include Memorial Day. Fed. R. Civ. P. 6(a). Therefore, these Objections are timely filed.

<sup>3</sup> Similarly, the Magistrate Judge made no mention of Fed. R. Civ. P. 37(a)(1) which provides that: “[t]he motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”

These Rules require written certification that after a good faith personal conference, the parties have reached an impasse with respect to the discovery dispute.<sup>4</sup> The Magistrate Judge's failure to squarely address these Rules is error in and of itself. And in failing to frame the Motion to Compel with these Rules in mind, the Magistrate Judge ignored or omitted undisputed facts which demonstrate that Defendants did not comply with Fed. R. Civ. P. 37(a)(1), Fed. R. Civ. P. 37(a)(5)(A)(i) or LCvR 37.1. Under these circumstances, the Magistrate Judge's grant of the Motion to Compel and imposition of fees and costs as a discovery sanction should be set aside as clearly erroneous and contrary to law.

In their Motion to Compel, Defendants reference a string of correspondence between counsel regarding the production of various data and documents, culminating in the above-referenced December 19, 2007 letter from Mr. Bullock to Mr. George. Motion to Compel, Dkt. #1605, at 4–7. Defendants also specifically refer to the November 30, 2007 letter from Mr. George to Mr. Bullock. *Id.* at 7. Again, Mr. George ended the November 30, 2007 letter by stating that if Defendants' alleged lingering concerns were not addressed by the State, the parties would need to schedule a meet and confer. Ltr. from R. George to L. Bullock, 11/30/07, Ex. 1, at 5. Of course, as of December 19, 2007, the State believed that it had fully addressed Defendants' lingering concerns.

Despite its obvious significance as the last communication between the parties concerning production issues prior to the Motion to Compel, the Magistrate Judge made no mention of the December 19, 2007 letter in the May 20 Order. As detailed above, the

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<sup>4</sup> See, e.g., *Burton v. R.J. Reynolds Tobacco Co.*, 203 F.R.D. 624, 625 (D. Kan. 2001); *Western Aerospace Corp. v. Glowczyk*, 2006 WL 3792658, \*1 (W.D. Wash., Dec. 20, 2006); *In re Presto*, 358 B.R. 290, 293 (Bkrtcy. S.D. Tex. 2006); *In re Lentek International, Inc.*, 2006 WL 2986997, \*2 (Bkrtcy. M.D. Fla., Sept. 12, 2006).

December 19, 2007 letter was the State's sincere and good faith attempt to respond to each of Defendants' alleged concerns with the continuing production. And, again, Defendants never notified the State of any perceived deficiencies with the responses in the December 19, 2007 letter, and, in fact, never replied in any manner to the December 19, 2007 letter.

The December 19, 2007 letter conclusively shows the parties had not reached an impasse on any discovery dispute at issue and that informal communications were ongoing. And it is uncontested that Defendants made no effort after December 19, 2007 to meet and confer, as they promised in the November 30, 2007 letter, or to otherwise informally resolve any remaining disputes.<sup>5</sup> Based on the silence from Defendants, the State had every reason to assume that the December 19, 2007 letter was fully responsive to Defendants' lingering concerns. Instead of scheduling a meet and confer as promised, Defendants chose to say nothing for over 60 days, and file their Motion to Compel without the slightest warning. Such conduct is the very antithesis of above-cited informal conference requirements, and cannot be characterized as a good faith attempt to obtain disclosure or discovery without court action. Defendants' manifest failure to comply with the informal conference requirements and the lack of good faith effort to obtain the discovery without court action clearly required the Magistrate Judge to deny the Motion

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<sup>5</sup> The only meet and confer session mentioned in the Motion to Compel occurred sometime in March 2007, involved the sole issue of DNA data and resulted in the State's agreement to produce that data. Specifically, the Motion to Compel provides, "[m]eet-and-confer sessions resulted in Plaintiffs' [sic] promise to produce the DNA information after the work was complete and the test results had undergone QA/QC analysis . . . ." Dkt. #1605 at 4. It is uncontested that DNA data was produced after the March 2007 meet and confer. And, as of December 19, 2007, the State reasonably believed it had alleviated any remaining concerns about the completeness of the DNA data production.

to Compel and the belated request for fees. *See, e.g., Gouin v. Gouin*, 230 F.R.D. 246, 247 (D. Mass. 2005); *Payless Shoesource Worldwide, Inc. v. Target Corp.*, 237 F.R.D. 666, 670–71 (D. Kan. 2006). For these reasons, the Magistrate Judge’s grant of the Motion to Compel and award of attorney fees must be set aside.

## **II. THE MAGISTRATE JUDGE’S IMPOSITION OF ATTORNEY FEES AND COSTS IS CONTRARY TO THE “SUBSTANTIALLY JUSTIFIED” AND “OTHER CIRCUMSTANCES” PROVISIONS OF RULE 37(a)(5)(A)**

The State believes that the meet and confer issue is dispositive and that the Magistrate Judge’s grant of the Motion to Compel and belated request for fees should be set aside on this ground alone. Nonetheless, there are other errors in the May 20 Order that warrant reversal. The Magistrate Judge did not mention in the May 20 Order that, under Fed. R. Civ. P. 37(a)(5)(A)(ii) and (iii), when discovery is produced after a motion to compel is filed: “. . . the court must not order th[e] payment [of attorney fees] if . . . the opposing party’s nondisclosure, response, or objection was substantially justified; or . . . other circumstances make an award of expenses unjust” (emphasis added). Rather than address the requirements of Rule 37(a)(5)(A)(ii) and (iii), the Magistrate Judge simply concluded that because “some of the data that should have been produced was not produced until after the motion to compel was filed and . . . the Federal Rules require the court to address an appropriate remedy.” Dkt. # 1710 at 4. In awarding fees and costs, the Magistrate Judge made no ruling on the State’s arguments that its production of data and other items after the Motion to Compel was substantially justified and that other circumstances render an award of fees unjust.

As part of its sur-reply brief, the State specifically argued as follows:

There are some overarching circumstances which make an award of fees unjust. First, this is not the typical discovery dispute where one party has

flatly refused to produce requested materials. Here, the State has produced all of the data required by the Court's January 5, 2007 Order, and has made substantial and good faith efforts to update the productions as fully and quickly as practicable. There is nothing to compel, and the Motion to Compel and reply are moot;[] this weighs against an award of fees. Second, the Court should consider the sheer volume of data the State has produced to date. As set forth in the Response to Defendants' Motion to Compel, the State's production of scientific data (and related items) has been a massive and complex effort. Defendants do not dispute this. Under such conditions, it should be expected that some data may not always be produced as quickly as Defendants would like; isolated good faith delays do not warrant an award of fees. The Court should also consider Defendants' failure to resolve the subject disputes outside of Court. *See, supra*. Lastly, the Court's January 5, 2007 Order did not place any time limitations on the production of new or supplemental data. The State cannot be sanctioned for any failure to comply with *Defendants'* arbitrary time constraints for supplemental production.

Dkt. #1691 at 5–6 (footnote omitted). In awarding fees, the Magistrate Judge plainly did not consider these arguments in the context of Rule 37(a)(5)(A)(ii) or (iii); and the Magistrate Judge's failure to consider the impact of these arguments under Rule 37(a)(5)(A)(ii) or (iii) was clear error. Moreover, the above circumstances taken together do, in fact, render an award of fees unjust under Rule 37(a)(5)(A)(iii). Thus, the Magistrate Judge's award of fees is contrary to law.

The State also offered the Affidavit of Todd Burgesser of CDM in order to provide further explanation for the items produced after the Motion to Compel was filed. Dkt. #1691-2. While the Magistrate Judge made limited reference to the Burgesser Affidavit in the May 20 Order, he erroneously failed to consider the Affidavit in the context of Rule 37(a)(5)(A)(ii) or (iii). The Burgesser Affidavit shows that most of the data that was produced on March 25, 2008 (after the Motion to Compel) was either generated in early 2008 or was merely a reproduction in electronic format of data

previously produced in hard copy format. *Id.* at ¶¶ 5–9; 11–12.<sup>6</sup> Furthermore, while Mr. Burgesser conceded that the production of certain diatom count, macroalgae and macroinvertebrate data was mistakenly delayed, he also explained that this data was simply overlooked in the midst of the approximately 100,000 pages that were produced. *Id.* at ¶¶ 14–15. The Burgesser Affidavit provides ample evidence that the production of March 25, 2008 was substantially justified and provides proof of circumstances which render an award of fees unjust. It was clearly erroneous for the Magistrate Judge to neglect consideration of the Affidavit in the context of Rule 37(a)(5)(A)(ii) and (iii).

### **III. THE MAGISTRATE JUDGE ERRONEOUSLY AWARDED FEES BASED UPON A VIOLATION OF RULE 26(e)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

As noted above, Defendants' Motion to Compel was based on the State's alleged failure to comply with the Court's January 5, 2007 Order. *See* Dkt. #1605. However, nowhere in the May 20 Order did the Magistrate Judge determine that the State violated the January 5, 2007 Order itself. Rather, the Magistrate Judge concluded that the State violated its obligation to timely supplement its production as required by Fed. R. Civ. P. 26(e)(1). Dkt. #1710 at 2 and 6. As established, the January 5, 2007 Order contains no timeliness requirement for supplementation. In their Motion to Compel, Defendants make no mention of Rule 26(e)(1), nor do they even generally allege that the State violated any statutory duty to timely supplement. Therefore, the Magistrate Judge's finding of a violation of Rule 26(e)(1) is purely *sua sponte*. Generally, a court should not raise arguments or issues *sua sponte*. *See, e.g., Hardiman v. Reynolds*, 971 F.2d 500, 502

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<sup>6</sup> While the Magistrate Judge took issue with the State's representation that most of the 2006 and 2007 data produced on March 25, 2008, had been previously produced in hard copy format, Defendants have offered no evidence to the contrary. The State maintains most of this 2006 and 2007 data was previously produced.

(10th Cir. 1992). It was improper and erroneous for the Magistrate Judge to make a ruling on Rule 26(e) *sua sponte* here.

Furthermore, the Magistrate Judge awarded fees to Defendants in part under Rule 37(b)(2). Dkt. #1710 at 5–6. However, Rule 37(b) only provides for sanctions when an order has been violated. Because the Magistrate Judge did not find that the State violated the January 5, 2007 Order, it was clearly erroneous and contrary to law for the Magistrate Judge to award fees under Rule 37(b).

**IV. IT WAS ERROR FOR THE MAGISTRATE JUDGE TO GRANT ATTORNEY FEES AS THE REQUEST FOR ATTORNEY FEES WAS NOT RAISED BY DEFENDANTS UNTIL THE REPLY BRIEF**

In the May 20 Order the Magistrate Judge concedes that “[n]o request for attorney fees and costs was made” in the Motion to Compel. Dkt. #1710 at 5. Further, counsel for Defendants admitted during the hearing that Defendants did not include a request for fees in the Motion to Compel, but raised it for the first time in their reply brief. Tr., 5/6/08, at 89. Nonetheless, without citation to authority or discussion, the Magistrate Judge concluded that Defendants made “proper demand” for attorney fees. Dkt. #1710 at 6. This aspect of the May 20 Order is also clearly erroneous and contrary to law.

This Court’s Local Civil Rules provide that reply briefs are to address “new matter in the response brief.” LCvR7.2(h). Local Rule 7.2(h) is not an open invitation to use a reply brief to raise new substantive grounds for relief or to seek additional relief. Yet, this is precisely what Defendants admittedly did here.

Defendants cannot use a reply brief to expand the scope of their Motion to Compel. *See, e.g., Valenzuela v. Smith*, 2006 WL 403842, \*2 (E.D. Cal. Feb. 16, 2006) (“Plaintiff may not amend or expand the scope of his motion to compel by raising new

issues in reply to opposition.”); *Peacock v. Merrill*, 2008 WL 176375, \*7 (S.D. Ala. Jan. 17, 2008). Defendants’ new request for attorney fees was blatantly contrary to this principle of law, and the Magistrate Judge should have denied it as such.

WHEREFORE, premises considered, the State respectfully requests that the Court set aside the Magistrate Judge’s May 20, 2008 Opinion and Order granting the Defendants’ Motion to Compel and the Defendants’ belated request for attorney fees and costs.

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**CERTIFICATE OF SERVICE**

I certify that on the 4<sup>th</sup> day of June, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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